

FINAL AWARD ALLOWING COMPENSATION

Injury No.: 08-063192

Employee: Fadil Music
Employer: Red Brick Management
Insurer: New Hampshire Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this separate opinion affirming certain of the administrative law judge's findings, reversing or modifying others, and making our own findings and conclusions as to the disputed issues. We do not adopt any portion of the administrative law judge's decision.

Introduction

The parties stipulated the following issues for resolution by the administrative law judge: (1) medical causation; (2) past medical expenses; (3) future medical expenses; (4) nature and extent of permanent disability; and (5) liability of the Second Injury Fund.

The administrative law judge rendered the following conclusions: (1) employee suffered a minor aggravation of personality disorder during the course of his treatment; (2) the Second Injury Fund is not liable for benefits; (3) employer is liable for medical expenses in the amount of \$4,666.00; (4) employer is not liable for future medical treatment; and (5) claimant is not credible because he "was very interested in his trial and testified passionately in long narratives."

Employee filed a timely Application for Review with the Commission alleging the administrative law judge erred in numerous respects.

We issue this separate award and decision resolving the disputed issues with our own findings, analysis, and conclusions. We note that Administrative Law Judge Joseph Denigan filled his award with overt misstatements of Missouri law, indulged in gratuitous disparagement of witnesses and their testimony as "misleading" or "sensational," and relied on facts that were either invented by the administrative law judge himself or imported from some other case. We would be remiss if we failed to note this is not the first time we have had to deal with such errors on the part of this administrative law judge.

Particularly in rendering factual findings that wholly depart from the evidence on record (the second such instance we have seen this year) we are concerned not only because the administrative law judge's errors make our task more difficult on appeal, but also because such errors risk the erosion of public confidence in the fairness and competency of the workers' compensation system as a whole.

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We can remedy only the most immediate of these concerns by issuing our separate opinion in this matter.

Findings of Fact

Preexisting conditions

Employee, who fought in the Bosnian War and endured numerous harrowing experiences both while under siege in Srebrenica and as a refugee thereafter, claims that he suffered preexisting post-traumatic stress disorder (PTSD). Employee presents testimony from Dr. Wolfgram, who confirmed the diagnosis of preexisting PTSD and rated the condition at 15% permanent partial disability of the body as a whole. Employer presented testimony from Dr. Stillings, who agreed on the diagnosis of preexisting PTSD, and who rated the condition at 30% permanent partial disability of the body as a whole.

Meanwhile, the Second Injury Fund argues that any psychiatric conditions employee suffered before the primary injury were not disabling. To back up this assertion, the Second Injury Fund does not present any expert testimony, but instead asks us to consider employee's robust work history and the fact he did not seek psychiatric treatment.

We are not persuaded by the Second Injury Fund's argument. The mere fact employee did not have treatment for his psychiatric condition does not mean it did not exist. Likewise, employee's ability to maintain consistent employment does not necessarily mean he was not suffering from a partially disabling psychiatric condition at the time. As Dr. Wolfgram credibly explained, after the Bosnian War ended, employee's acute PTSD symptoms subsided, but he was never cured of the underlying condition and it remained a part of his life at all times. Likewise, Dr. Stillings acknowledged on cross-examination that he had no information to indicate employee had a poor work history, but nonetheless identified a significant preexisting disability referable to PTSD. Dr. Stillings explained that the preexisting PTSD would have prevented employee from tolerating any jobs that were very stressful.

After careful consideration, we decline the Second Injury Fund's invitation to reject the uncontested expert opinions from Drs. Wolfgram and Stillings on this issue. Instead, we credit both doctors and find that, at the time of the primary injury, employee suffered preexisting permanent partial disability referable to PTSD.

The primary injury

On July 24, 2008, employee suffered an accident while working for employer. Employee, who had been tasked with painting an apartment, was standing on a kitchen countertop in order to paint around cabinets when he fell. In the course of the fall, employee struck his upper back against the cabinets. The next day, employer sent employee to Concentra, where he complained of upper back and neck pain and thoracolumbar discomfort, and where treating doctors diagnosed a contusion and dermal abrasion to the back and released employee at full duty with a recommendation to use over-the-counter pain medications and ice. Unhappy with this result, and acting on his supervisor's permission, employee received additional self-directed treatment in addition to further treatment through employer's authorized doctors up until February 23, 2009. Employee received

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conservative treatment including physical therapy, medications, diagnostic studies, and injections.

Employee is claiming permanent physical and psychiatric injuries resulting from the July 2008 accident. Employee presents testimony from Dr. Volarich, who provided the following diagnoses and ratings attributable to the accident: 25% permanent partial disability of the body as a whole for cervical left arm radicular syndrome secondary to disc bulges and aggravation of degenerative disc and joint disease at C4-5, C5-6, and C6-7; 30% of the body as a whole for lumbar left leg radicular syndrome secondary to disc bulge to the left at L3-4, bulge and annular tear at L4-5 causing bilateral lower extremity radicular symptoms; 20% of the left shoulder for rotator cuff tendinopathy and mild impingement; and moderately severe pain syndrome with some features of myofascial pain (not rated). Dr. Volarich also issued very limiting restrictions, including no lifting over 15-20 pounds, and that employee should be permitted to rest when needed.

Meanwhile, employer presents Dr. Hurford, the authorized treating doctor, who provided the following diagnoses and permanent partial disability ratings referable to the accident: 0% permanent partial disability for a cervical contusion or neck bruise with strain; 3% of the body as a whole referable to mid back contusion and lumbosacral syndrome; and 2% of the left shoulder referable to left shoulder pain. Dr. Hurford opined that employee reached maximum medical improvement on February 23, 2009. Dr. Hurford assigned the following restrictions referable to the work injury: no lifting greater than 50 pounds occasional and 10 pounds frequently, and no work or activity over the shoulder.

After careful consideration, we find Dr. Hurford more credible than Dr. Volarich with regard to the physical injuries employee suffered in the July 2008 accident. Dr. Volarich conceded on cross-examination that, despite his diagnosis of left arm radicular pain, employee didn't actually complain of left arm symptoms on exam. Dr. Volarich also agreed on cross-examination that employee's documented reports of variable right versus left leg symptoms are inconsistent with a diagnosis of radicular pain.

Accordingly, we credit Dr. Hurford's testimony (and so find) that employee sustained the following injuries as a result of the accident on July 24, 2008: a cervical contusion or neck bruise with strain; a mid back contusion and lumbosacral syndrome; and left shoulder pain. We disagree, however, with Dr. Hurford's low permanent partial disability ratings. We note that employer, in asking us to affirm the administrative law judge's award, concedes employee sustained a 15% permanent partial disability of the low back and 7.5% permanent partial disability of the left shoulder. Given these circumstances, we adopt these ratings and find that they accurately reflect the level of physical disability employee suffers following the accident.

As to employee's psychiatric injuries, employee's expert Dr. Wolfgram rated permanent partial disability resulting from the accident as follows (all "body as a whole" ratings): 20% referable to PTSD, 20% referable to pain disorder with psychological factors, and 20% referable to major depression. Employer's expert Dr. Stillings, on the other hand,

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rated only 2% permanent partial disability of the body as a whole referable to aggravation of a preexisting personality disorder.

Especially given the backdrop of considerable PTSD owing to employee's harrowing experiences during and after the Bosnian War, we are not persuaded by Dr. Wolfgram's testimony that the accident is the primary source of employee's psychiatric problems to the extent that it resulted in a total 60% permanent partial psychiatric disability. But notably, all doctors agree that employee is probably suffering a pain disorder as a result of the July 2008 accident. While Drs. Volarich and Stillings suggest the origin of employee's pain problem is physical rather than mental, we believe that Dr. Wolfgram's Axis I diagnosis of a pain disorder with psychological factors best explains why employee's pain complaints are not in keeping with his physical injuries and why he finds no relief from conventional treatments such as pain medications.

Accordingly, we credit Dr. Wolfgram's testimony that the July 2008 accident was the prevailing factor causing employee to sustain a pain disorder with psychological factors. In light of employer's concession that employee suffered the 2% permanent partial psychiatric disability identified by Dr. Stillings as aggravation of a preexisting personality disorder, we credit Dr. Stillings's testimony the July 2008 accident was the prevailing factor causing employee to suffer an aggravation of preexisting personality disorder.

Past medical expenses

Employer is asking us to affirm the administrative law judge's award in the amount of \$4,666.00 for past medical expenses incurred for treatment employee obtained on his own prior to February 23, 2009, but that has been subsequently accepted by employer as having been authorized via employee's supervisor. Given these circumstances, we find that employee incurred \$4,666.00 in medical expenses as a result of the self-directed treatment he obtained prior to February 23, 2009, and that these expenses were retroactively authorized by employer as flowing from the work injury.

Employee incurred an additional \$17,759.78 in disputed past medical expenses. Dr. Volarich testified in a general manner that all of employee's injuries required conservative treatment, suggesting employee's unauthorized past medical expenses flowed from the work injury. But for reasons already explained above, we found Dr. Volarich's testimony lacking credibility with regard to the effects of the accident, and so we likewise find his implied opinions as to the care that was reasonably required following the accident to lack credibility. Instead, we credit Dr. Hurford's testimony (and so find) that employee reached maximum medical improvement on February 23, 2009, along with what Dr. Hurford's opinion implies; namely, that employee's subsequent unauthorized treatment did not flow from the effects of the work injury.

Future medical care

With regard to future medical care, Dr. Volarich opined that narcotics, non-narcotic medications, muscle relaxants, physical therapy, epidural steroid injections, foraminal nerve root blocks, trigger point injections, TENS units, and similar treatments would all help control employee's pain syndrome. We have found Dr. Volarich's view that employee's pain complaints stem from physical injuries to lack credibility. Accordingly,

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we are not persuaded by his testimony that employee needs the foregoing treatments in light of his pain syndrome.

Dr. Wolfgram addressed future medical care and recommended treatment in the form of "pain management." Dr. Wolfgram noted that employee's use of anti-anxiety medication in combination with controlled use of narcotics may have helped him somewhat in the short-term, but in the future employee should receive supportive psychotherapy and counseling. We credit Dr. Wolfgram on the issue of the future medical care that may reasonably be required to cure and relieve the effects of employee's pain syndrome.

Permanent total disability

The parties dispute whether employee is permanently and totally disabled, and if so, whether such condition is owing to a combination of the work injury and his preexisting conditions, or the effects of the work injury alone. On this question, both vocational experts appear to be in substantial agreement. James England believes employee is permanently and totally disabled owing to a combination of his poor English skills and the combination of his physical and psychiatric problems. Ms. Abram testified that, while she believes employee is "employable," she also believes he will probably not be able to successfully compete for jobs, identifying the combination of his problems as the cause. (Ms. Abram qualified this admission by opining that if employee gets better control of his pain condition, or if "we had a different labor market," employee could successfully compete.) Dr. Wolfgram also opined that, from a psychiatric standpoint, employee is permanently and totally disabled owing to the primary injury in combination with his preexisting conditions.

Employee also provided testimony from his son-in-law and neighbor, Mersad Muratovic, who spends a considerable amount of time and money caring for employee. Mr. Muratovic corroborated many of employee's complaints about his limitations. We find both employee and Mr. Muratovic credible on the issue of employee's limitations.

After careful consideration, we find the expert permanent total disability opinions from Mr. England and Dr. Wolfgram, as summarized above, most credible.

Conclusions of Law

Medical causation

Section 287.020.3(1) RSMo sets forth the standard for medical causation applicable to this claim and provides, in relevant part, as follows:

An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

We have credited Dr. Hurford's testimony over that offered by Dr. Volarich on the issue of the physical injuries suffered by employee, although we disagreed somewhat with her disability ratings. We have further credited Dr. Wolfgram to the extent that he opined

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that the accident caused employee to sustain a chronic pain disorder as a psychiatric injury.

Accordingly, we conclude the July 2008 accident was the prevailing factor causing a 15% permanent partial disability of the body as a whole referable to lumbosacral syndrome and 7.5% permanent partial disability at the 232-week level of the left shoulder referable to left shoulder pain. Also, given employee's considerable and ongoing difficulties with intractable pain complaints following the work injury, we conclude the July 2008 accident was the prevailing factor causing employee to develop a pain disorder with psychological factors that constitutes a 20% permanent partial psychiatric disability of the body as a whole on top of the 2% awarded by the administrative law judge, which employer, in its brief, asks us to affirm.

Past medical expenses

Section 287.140 RSMo is controlling on the issue of past medical expenses, and provides, as follows:

In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

"[A]n employer is responsible for medical treatment ... if the care flows from the accident, via evidence of a medical causal relationship between the condition and the compensable injury." *Tillotson v. St. Joseph Med. Ctr.*, 347 S.W.3d 511, 520 (Mo. App. 2011) (internal citations and quotations omitted).

Employer paid employee's medical expenses up until Dr. Hurford released him on February 23, 2009. Employee is asking for an award of additional past medical expenses for office visits, prescriptions, diagnostic studies, and other treatments attributable to his own doctors' attempts to treat his pain. Employee has not sought psychiatric care in connection with his pain disorder. Employer, on the other hand, is asking that we affirm the \$4,666.00 award of past medical expenses entered by the administrative law judge.

Ultimately, we are more persuaded by employer's argument. This is because we have credited Dr. Hurford with regard to employee's having reached maximum medical improvement from the physical effects of the work injury on February 23, 2009, and because we found no expert testimony that specifically and credibly established that employee's treatment after February 23, 2009, was reasonable and necessary to treat employee's psychiatric injury in the form of a pain disorder. We believe the question of what care and treatment may reasonably be required to treat employee's pain disorder with psychological factors does not fairly come within the realm of lay understanding.

Employee fails to explain, in his brief, why the claimed past medical expenses flow from the work injury. Instead, employee identifies a stipulation by the parties and argues that

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it is determinative of the issue. We acknowledge the parties' stipulation that "the providers would testify that the care and treatment that they rendered was reasonable and necessary and that the bills were reasonable and necessary as well and that the employee would testify to a foundation in accordance with *Martin v. Mid America Farm Lines*, 769 S.W.2d 105 (Mo. banc 1989)." *Transcript*, page 3. But we fail to see why employee expects this stipulation to be controlling on the issue of past medical expenses. Employer may have stipulated that the providers would testify that the care and treatment they rendered was "reasonable and necessary," but this doesn't mean employer stipulated to the *credibility* of that testimony, or that the claimed expenses were incurred as a result of care and treatment that actually flowed from the work injury. To the contrary, employer unquestionably disputes that issue.

In light of our findings on the issue of medical causation, specifically that Dr. Hurford provides the more credible medical causation testimony on the subject of the physical effects of employee's work injury, and because employee fails in his brief to identify evidence supporting his arguments, we affirm, per employer's request, the award of \$4,666.00 in past medical expenses, and we conclude that any further expenses were incurred for treatments that did not flow from the work injury.

Future medical expenses

Employer is liable under § 287.140 RSMo to provide future medical treatment where employee establishes a reasonable probability that he will have a need for future care that flows from the work injury. *Poole v. City of St. Louis*, 328 S.W.3d 277, 291 (Mo. App. 2010).

On the issue of future medical care, we have credited Dr. Hurford over Dr. Volarich. We conclude that employee is not in need of future medical treatments to cure and relieve the effects of his physical injuries sustained in the work injury. On the other hand, we have credited Dr. Wolfgram's testimony that employee sustained a pain disorder with psychological factors as a result of the work injury, and that employee will require pain management, supportive psychotherapy, counseling, and other treatments for this condition.

We conclude, therefore, that there is a reasonable probability that employee will need future medical care in connection with his pain disorder. Employer is liable to provide such treatment as may reasonably be required to cure and relieve the effects of employee's chronic pain disorder.

Second Injury Fund liability

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid in "all cases of permanent disability where there has been previous disability." As a preliminary matter, the employee must show that he suffers from "a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed ..." *Id.* The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a "hindrance or obstacle to employment":

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[T]he proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.

Knisley v. Charleswood Corp., 211 S.W.3d 629, 637 (Mo. App. 2007) (citation omitted).

We have found employee suffered from a preexisting permanent partial disability referable to PTSD at the time he sustained the work injury. We are convinced this condition was serious enough to constitute a hindrance or obstacle to employment. This is because we are convinced employee's preexisting PTSD had the potential to combine with a future psychiatric injury to result in worse disability than would have resulted in the absence of the condition. The very facts of this case demonstrate how the preexisting PTSD, while not keeping employee from being gainfully employed before the work injury, later combined with his chronic pain disorder with the effect that employee is severely limited in his abilities and activities.

Having found employee suffered a preexisting permanent partial disability in the form of PTSD that amounted to a hindrance or obstacle to employment, we turn to the question whether the Second Injury Fund is liable for permanent total disability benefits. In order to prove his entitlement to such an award, employee must establish that: (1) he suffered a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). Section 287.220.1 requires us to first determine the compensation liability of the employer for the last injury, considered alone. If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, not the Second Injury Fund, is responsible for the entire amount of compensation. "Pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003).

We have found employee sustained permanent partial disability as a result of the primary injury, and credited the expert opinions from Dr. Wolfgram and Mr. England that employee is permanently and totally disabled owing to the combination of his preexisting disabilities in combination with the effects of the primary injury.

Accordingly, we conclude employee was not permanently and totally disabled by the work injury considered alone and in isolation. Instead, we conclude employee is permanently and totally disabled owing to a combination of his preexisting PTSD in combination with the effects of the work injury. The Second Injury Fund is liable for permanent total disability benefits.

Award

Employer is liable for 165.4 weeks of permanent partial disability benefits at the stipulated rate of \$404.66.

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Employer is liable for employee's past medical expenses in the amount of \$4,666.00.

Employer is liable to provide future medical care that may reasonably be required to cure and relieve the effects of employee's pain disorder with psychological factors.

Beginning February 23, 2009, the date employee reached maximum medical improvement, the Second Injury Fund is liable for permanent total disability benefits at the differential rate of \$22.00 for 165.4 weeks, and thereafter at the stipulated permanent total disability rate of \$426.66.

This award is subject to a lien in favor of Frank Niesen, Attorney at Law, in the amount of 25% for necessary legal services rendered.

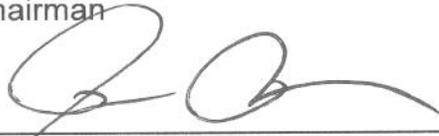
Any past due compensation shall bear interest as provided by law.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued May 3, 2012, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 3rd day of January 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

VACANT
Chairman



James Avery, Member

Curtis E. Chick, Jr.
Curtis E. Chick, Jr., Member

Attest:

Pamela M. Hojman
Secretary

AWARD

Employee: Fadil Music

Injury No.: 08-063192

Dependents: N/A

Employer: Red Brick Management

Additional Party: Second Injury Fund

Insurer: Insurance Company

Hearing Date: January 31, 2012

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: JED:sw

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: July 24, 2008
5. State location where accident occurred or occupational disease was contracted: St. Louis, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee fell off a kitchen counter-top while painting a residence.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Left shoulder, low back, neck.
14. Nature and extent of any permanent disability: 7.5% PPD left shoulder; 15% PPD low back; 2% PPD psych
15. Compensation paid to-date for temporary disability: \$13,043.60
16. Value necessary medical aid paid to date by employer/insurer? \$15,696.95

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- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$640.00
- 19. Weekly compensation rate: \$426.66/\$404.60
- 20. Method wages computation: stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses	\$ 4,666.00
85.4 weeks permanent partial disability from Employer	34,552.84

22. Second Injury Fund liability: No

TOTAL: \$39,218.84

23. Future requirements awarded: None

Said payments to begin forthwith and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Frank Niesen, Jr.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Fadil Music	Injury No.:	08-063192
Dependents:	N/A	Before the	
Employer:	Red Brick Management	Division of Workers'	
Additional Party:	Second Injury Fund	Compensation	
Insurer:	Insurance Company	Department of Labor and Industrial	
Hearing Date:	January 31, 2012	Relations of Missouri	
		Jefferson City, Missouri	
		Checked by: JED:sw	

This case involves a compensable low back and left shoulder injury resulting to Claimant with the reported accident date of July 24, 2008. Employer admits Claimant was employed on the reported accident date and that any liability is fully insured. The Second injury Fund (“SIF”) is a party to this case. All parties are represented by counsel.

Issues for Trial

1. Medical Causation;
2. liability for unpaid medical expenses (stipulated amount);
3. authorization of medical treatment;
4. reasonableness and necessity of medical treatment;
5. nature and extent of permanent disability;
6. future medical expense;
7. liability of the Second Injury Fund.

FINDINGS OF FACT

Dispositive Evidence

1. Claimant is 49 years old, married with three adult children one of whom lives at home.
2. Claimant is Bosnian having entered the country in September 2002 but is still unable to speak the language (trial occurred with a translator).

3. Claimant lost his home improvement business in 2007. (Claimant's history to Dr. Stillings is that he sought work with Employer because he needed health insurance benefits.)

Orthopedic injury

4. On the reported accident date, Claimant fell off a counter-top while painting a residential kitchen. Claimant treated his left shoulder and low back.

5. Claimant first treated at Concentra where he was released with non-prescription anti-inflammatory medication and returned to work full-duty.

6. After he discontinued his physical therapy through Concentra, Claimant next treated privately with Dr. Mahrukh Khan and Dr. Hafiz Khattak with the tacit approval of employer's supervisor.

7. Treatment was resumed by Employer through Patricia Hurford, M.D., with St. Louis Spine Care Alliance as of September 8, 2008.

8. Claimant continued to also treat privately with Dr. Gahn, for discography and CT scan, which ultimately showed an annular tear at L4-5.

9. Claimant first saw Dr. Hurford on September 15, 2008 who diagnosed the left shoulder with tendonitis and the low back with a small annular tear at L4-5 along with degenerative disc disease. No surgery recommendations were made but Claimant had lumbar injection therapy. (Claimant refused subsequent injections.) The magnitude of complaints were incongruous with studies and prior clinical findings. She noted alternating radicular complaints.

10. Dr. Hurford release Claimant on February 23, 2009. She rated Claimant's shoulder injury at two percent permanent partial disability (PPD) and the lumbar injury at three percent PPD. She assigned no PPD to the cervical injury which resolved.

11. Employer offered the deposition of Dr. Hurford as Exhibit 1.

* * *

12. After release by Dr. Hurford, Claimant did not seek additional treatment through the Division but elected to privately resume treatment with Dr. Khattak on February 26, 2009.

13. Similar to notes of Dr. Hurford, clinical notes by Dr. Khattak show a variety of positive ROM findings contrasted against normal muscle tone and strength seven months post-accident. Claimant apparently continues to treat palliatively with Dr. Khattak through date of hearing.

* * *

14. Claimant offered the October 2010 deposition of Dr. David Volarich as Exhibit J. Dr. Volarich reviewed the record and examined Claimant in September 2009. History included Claimant's statement that he could not lift anything with his left upper extremity and that he had radicular symptoms in both legs. Notes on physical examination included 4/5 strength in the left shoulder when compared to the right which was 5/5; the biceps, triceps and forearms were strong.

15. Sensory and examination and reflexes were essentially normal. Claimant could toe-walk, heel-walk, tandem-walk, and stand on either leg without difficulty. Claimant had some pain on straight leg raising at 70 degrees. Claimant could squat fully and stand back upright to an erect position with only some discomfort.

Dr. Volarich admitted that while Claimant's patient history asserted any movement caused him pain, claimant nevertheless, proceeded through the regimen of physical examination without complaint of pain. (p. 42)

16. Dr. Volarich assigned a twenty-five percent PPD of the cervical spine, thirty percent of the low back and twenty percent PPD of the left shoulder. He assigned restrictions of avoiding bending and stooping and a twenty pound lifting restriction. Dr. Volarich did not state Claimant was unemployable. He deferred any mental evaluation.

Post-Traumatic Stress Disorder

17. Claimant endured considerable stress as a soldier and refugee in the Bosnian War in 1995. He lived under siege, many family members suffered death and severe injury, and he escaped from Srebrenica among thousands.

18. The traumatic experiences of the Bosnian War were resurrected by brutal robbery and injury by gang members upon arrival in the United States in 2002. Claimant was disturbed by television accounts and video of the Iraq War beginning that same year, and thereafter. He was disturbed by a return trip to Bosnia in 2006. In 2007, he viewed a documentary film on the Srebrenica Massacre in the Bosnian War.

19. Claimant's non-orthopedic treatment record herein is limited to pharmaceuticals; there is no treating psychiatrist, or psychologist, either before or after the reported injury.

Psychiatric Opinion

20. Claimant offered the April 2011 deposition of Dr. Wolfgram as Exhibit K. Dr. Wolfgram examined Claimant in November 2009. Dr. Wolfgram diagnosed post-traumatic stress disorder (PTSD), chronic from Claimant's experience in the Bosnian War. He also diagnosed major depressive disorder. Dr. Wolfgram asserts the illness subsided and then recurred with the advent of the reported injury.

21. Dr. Wolfgram assigned a fifteen percent PPD for PTSD to the many years of war and refugee status, twenty percent PPD due to the "recurrence" of the PTSD, twenty percent to the chronic

pain disorder, and twenty percent PPD to the major depression all resulting from the reported injury.

22. Dr. Wolffgram testified that Claimant believed, regarding his own treatment, that any kind of movement makes him "worse" and that he "he's best when he is actually in his recliner at home for ten, twelve, hours a day" (while receiving anti-anxiety medication and hydrocodone, a narcotic). Dr. Wolfgram further testified:

There's some sort of outside thought that maybe surgery would solve it. [Claimant's] had various opinions on that, as these participants here today know, that some people feel it would be contraindicated yet some people think it might be worthwhile, and so that is still open as to whether or not he would have surgery but he's not very enthused about it. (p. 15)

23. Dr. Wolfgram stated Claimant is unable to compete in the open labor market (although this is not mentioned in his narrative report date December 14, 2009).

24. Dr. Wolrgram understood Claimant to have sustained "profound loss of muscle mass." (p. 27-28)

25. Dr. Wolfgram recommended future medical care in the form of aqua therapy, then physical therapy and supportive psychotherapy. He re-asserted surgical recommendation and that it should be considered.

26. On cross examination, Dr. Wolfgram admitted the 2006 return trip to Bosnia was disturbing to Claimant.

27. Employer offered the deposition of Dr. Wayne Stillings as Exhibit 2. Dr. Stillings reviewed the record, examined Claimant and performed numerous tests. See Exhibit 2; *Deposition Exhibit 2*.

28. Dr. Stillings found a two percent PPD of the body referable to mild aggravation of his pre-existing personality disorder. Dr. Stillings diagnosed a severe pre-existing PTSD. He said the PTSD was neither caused nor aggravated by the reported injury.

29. Dr. Stillings found through testing that Claimant had a high degree of exaggeration and malingering. This is also traced in the treatment records of Dr. Hurford two years earlier.

30. Dr. Stillings disputed that the reported injury aggravated Claimant's condition of PTSD.

31. Dr. Stillings disputed that Claimant has a psychological pain disorder.

32. Dr. Stillings disputed that Claimant required psychiatric treatment or that he needed to work under restrictions from a psychiatric standpoint. He stated on cross examination that Claimant probably needed a low stress employment given his pre-existing PTSD.

* * *

33. Claimant offered the deposition of James England, licensed counselor, as Exhibit L. Mr. England noted Claimant's familiarity with a wide variety of carpentry, electrical and plumbing tools. He thought Claimant could engage with light exertion which is consistent with various lifting restrictions found in the record. However, the language deficit made doubtful full use of his construction experience. A variety of cleaning jobs remained available which do not require great language fluency. With respect to Dr. Volarich's restrictions, Mr. England still believed Claimant could *physically* perform sedentary work. The addition of psychiatric problems identified in the evidence prevented Claimant from competing in the open labor market. He believed that significant pre-existing psychiatric PPD would be a hindrance or obstacle to employment.

34. Employer offered the deposition of Donna Abrams, licensed counselor, as Exhibit 4. Ms. Abrams examined Claimant and reviewed the record. She concluded Claimant had average level of general learning and was working in a skilled level when the reported injury occurred. He had a steady work record. She noted his knowledge of construction skills including some supervisory experience affording him the ability to inspect and evaluate the quality of work performed. Ms. Abrams thought Claimant's English proficiency was sufficient to complete assigned tasks. She listed a variety of employment possibilities.

35. Claimant receives social security disability benefits for orthopedic and psychiatric disabilities (Exhibit O).

* * *

36. Claimant offered numerous medical bills in evidence seeking reimbursement. Employer authorized transfer of care to Dr. Hurford as of September 8, 2008. Medical services requested prior to Employer's transfer of care but nevertheless, were tacitly approved by claimant's supervisor and were consistent with Dr. Hurford's treatment, include an MRI at Forest Park Hospital for \$2,684.00, a bone scan for \$932.00, and an interpretation report of the MRI for \$125.00. In addition, the office bill from Dr. Gahn for \$320.00 and the bills from Drs. Khan, Kaattak, and Smith were also incurred prior to the transfer of care to Dr. Hurford.

37. Claimant offered no evidence that the other bills, incurred subsequent to Employer's resumption of care, were authorized, or ratified.

38. The record contains no proof of the *necessity* of treatment by particular providers (on respective dates) rendering treatment after September 8, 2008. Nor does the record contain opinion evidence on the *reasonableness* of any of bills not shown to have been ratified by Employer in September 2009.

RULINGS OF LAW

Medical Causation

With all proofs in complex medical evidence, a medical expert's opinion must be supported by facts and reasons proven by competent evidence that will give the opinion sufficient

probative force to be substantial evidence. Silman v. Wm. Montgomery & Assoc., 891 S.W.2d 173, 176 (Mo.App. 1995), *citing* Pippin v. St. Joe Mineral Corp., 799 S.W.2d 898, 904 (Mo.App. 1990). Any weakness in the underpinnings of an expert opinion goes to the weight and value thereof. Hall v. Brady Investments, Inc., 684 S.W.2d 379 (Mo.App. 1984). Here, Claimant was diagnosed with left shoulder, low back and neck injuries by Dr. Hurford and was treated consistent with the stipulated payment of medical expenses and TTD benefits. (Additional medical care undertaken privately prior to September 8 2008, was ratified by Employer as discussed herein.) Dr. Hurford found the injuries work related and found permanent partial disability in the left shoulder and low back as described above. The cervical contusion resolved.

Dr. Volarich basically made the same findings as the treating physician with additional PPD findings of the cervical spine despite the absence of any radiculopathy or other clinical evidence in the treatment records. Dr. Volarich did expand the diagnoses of the shoulder to include impingement; he understated the diffuse degenerative disc disease apparent in the MRI readings and assigned no pre-existing low back PPD.

* * *

Regarding psychiatric disability, both Dr. Wolfgram and Dr. Stillings diagnosed PTSD due to experiences in the Bosnian War. Dr. Wolfgram also diagnosed major depression due to the reported injury and stated the PTSD was aggravated by the reported injury. Each also assigned pre-existing permanent partial disability.

Noteworthy is the absence of any post-accident psychiatric treatment record corroborative of *disabling* psychiatric symptoms that might lend cogence to the chronology herein. Also noteworthy is the absence of any serious post-accident treatment supervised by a psychiatrist or psychologist. Neither psychiatric expert here expressly ruled out competing social, financial or domestic issues as causes of Claimant's fears and sadness.

Claimant's expert, Dr. Wolfgram, with no explanation, and without any treatment records as a road map, baldly asserted that the disabling psychiatric conditions re-appeared secondary to the "complications" of the reported accident. The contents of his narrative report warrants comment. Under the subtitle "Psychiatric History Regarding the injury of July 24, 2008" there follows approximately 160 words the first paragraph of which is a subjective day-in-the-life narrative, a second paragraph of anecdotal impressions of Claimant's daughter who Dr. Wolfgram interviewed and a third paragraph (three lines) of very superficial, and generic, remarks about family support and hardship. In another instance, under "Previous Psychiatric History," Dr. Wolfgram quotes Claimant's personal view of his life in one page without mention of any treatment, diagnoses, analysis or opinion. At no point does Dr Wolfgram explain his quantification or method of attribution of PPD percentages. At no point does he mention permanent total disability in his narrative report but in his deposition he states Claimant is unable to compete in the open labor market.

In his deposition, Dr. Wolfgram described Claimant's fall at work as substantial but adds that Claimant continued to work the remainder of the day. Although he twice mentioned surgical recommendations for Claimant, none are identified in the medical evidence. (p. 15, 27-28) This sort of vague allusion to surgery can only be interpreted to suggest to the reader a situation

serious enough to warrant surgical intervention; Dr. Wolfgram's statement is inaccurate and misleading. Claimant's other expert, Dr. Volarich, was more forthright in his forecast that, "[s]hould the symptoms worsen in the future," consultation should be made with an expert surgeon. (See Exhibit J; *Deposition Exhibit 2*.)

Dr. Wolfgram identified no contemporaneous treatment records for psychiatric symptoms contemporaneous with any of Claimant's significant life events whether pre-accident, emergent to the accident, or post-accident. His report and deposition testimony are largely conclusory and, thus, unpersuasive.

Dr. Wolfgram's unexplained prescriptions at the end of his brief narrative report seem sensational in the absence of any foundation; Dr. Wolfgram seemed unaware on the date of his deposition that there had been no medical activity on this file in several years.

Dr. Wolfgram's ultimate opinions are based on facts not in evidence (p. 29-30). In addition, his opinions contradict statements of Claimant other expert, Dr. Volarich: Dr. Volarich described injuries to the left shoulder, neck and low back and summarized, "all of them required conservative treatment[,] not surgery. (p. 23)

Dr. Stillings's thoroughness, beginning with his report and comprehensive testing, best reconciles all parts of the evidence including Claimant's testimony, clinical presentation as memorialized in the treatment records (plus Dr. Volarich's clinical findings), outside activity when pain-free, and the uneventful treatment record, including the absence of any serious psychiatric treatment or therapy, either before and after the reported accident. Accordingly, Dr. Stillings' analysis is more persuasive and compels a finding that the reported accident neither aggravated the PTSD nor caused a major depression. Rather, only a minor aggravation of personality disorder has occurred during the course of treatment.

Nature and Extent of Permanent Disability

Orthopedic Disability

Claimant and Employer presented evidence of permanent partial disability for shoulder back and neck injuries. In addition, pursuant to Claimant's allegation of permanent total disability, both Claimant and Employer offered expert opinion on psychiatric disability.¹

Claimant's left shoulder injury was uneventful; no physician recommended any invasive procedures and treatment was limited to medications and some physical therapy. Claimant offered no evidence that he has treated his shoulder since being released by Dr. Hurford. Dr. Volarich found good strength in the left arm and only a 4/5 deficit in the left shoulder. This record of treatment and residual findings suggests a PPD range of ten percent.

Claimant's low back injury was more serious inasmuch as it involved some injection therapy. However, Claimant's clinical presentation never precipitated a surgical referral let alone a surgical recommendation. Claimant's clinical presentation to his own expert, Dr. Volarich, had

¹ Noteworthy is the dearth of evidence offered on behalf of the Second Injury Fund despite expert assertions of serious Fund liability due to the combination of current and pre-existing PPD.

limited positive findings consistent with the treatment record. This suggests PPD in the range of fifteen percent.

The record does not support a finding of cervical PPD. Neither patient complaints nor diagnoses support an active cervical pathology. Claimant complained of headaches but nothing in the record suggests treatable pain or neurological symptoms, eg. radiculopathy, relative to neck injury. Dr. Hurford found the neck injury resolved. Similarly, Dr. Volarich's high assessment of cervical PPD based on radiological data is not supported by companion clinical presentation.

Allegation of Permanent Total Disability

Chapter 287 contemplates permanent total disability if the injured employee is unable to work for the remainder of his life as a result of either the primary injury or the synergistic effect between the primary injury and pre-existing disability. Section 287.200 RSMo (Cum. Supp. 2005). The tragic consequence to Claimant, while unfortunate, does not excuse proof of one of the elements of Section 287.220.1, specifically, the requirement that the primary disability *combine* with any pre-existing disability.

Here, Claimant's injury to the low back may be characterized as significant but is only a *partial* disability as admitted by Dr. Volarich's own PPD assessment of thirty percent PPD. The shoulder injury does not meet threshold under subsection 220.1. His injuries are fairly described as serious soft tissue injuries. These relatively minor injuries do not predicate a lifetime of total disability. Catastrophic injuries are defined at Section 287.146 et seq. RSMo (2000).

Claimant's psychiatric disability, however, is very serious. Claimant has longstanding PTSD that has had a least three very serious aggravations that occurred prior to the reported injury herein, i.e. the 2002 robbery incident and the viewing of Iraq War video over the past decade and the memorial visit to the site of the Srebrenica Massacre. As explained by Dr. Stillings, this condition was unaffected by Claimant's fall off the counter-top and resulting soft tissue injuries.

Liability of the Second Injury Fund

Before Claimant can recover permanent total disability benefits from the SIF, he must prove that the reported injury (or last injury), combined with his pre-existing PTSD condition, resulted in him becoming permanently and totally disabled. Dunn v. Treasurer of Missouri, 272 S.W.3d 267, 272 (Mo.App. 2008). Claimant's severe PTSD condition, including pre-accident relapses, pre-exists the reported injury. The medical record of same is undisputed in the evidence but is not consistently or convincingly addressed by several of the experts. With all proofs in complex medical evidence, a medical expert's opinion must be supported by facts and reasons proven by competent evidence that will give the opinion sufficient probative force to be substantial evidence. Silman v. Wm. Montgomery & Assoc., 891 S.W.2d 173, 176 (Mo.App. 1995), *citing* Pippin v. St. Joe Mineral Corp., 799 S.W.2d 898, 904 (Mo.App. 1990). Any weakness in the underpinnings of an expert opinion goes to the weight and value thereof. Hall v. Brady Investments, Inc., 684 S.W.2d 379 (Mo.App. 1984).

The bald assertion by forensic witnesses that Claimant PTSD “combines” with the primary injuries is at once, unexplained and untenable. No where in the record Does Dr. Volarich say how the PTSD disability combines with the primary disability.

An administrative law judge is not bound by experts’ legal conclusions regarding SIF liability or even “permanent total disability.” Rather, the administrative law judge must give due consideration to properly qualified and well-founded opinions, that are otherwise competent and admissible in evidence, and determine the issues. See Silman v. Wm. Montgomery & Assoc., 891 S.W.2d 173, 176 (Mo.App. 1995), citing Pippin v. St. Joe Mineral Corp., 799 S.W.2d 898, 904 (Mo.App. 1990). Rulings of law cannot depend on the assertive use of legal words by testifying experts. To do so is to abdicate responsibility to those same experts. These experts cannot determine “diminished earning capacity” or any other legal issue. Sections 287.190, 287.460 RSMo (Cum. Supp. 2005).

Here, the permanent partial disability finding to the low back at fifteen percent meets the statutory threshold. The pre-existing PTSD is fairly stated to meet the same threshold in a range of twenty percent, or more. Nevertheless, However, Claimant offered no credible evidence that the primary injury to the low back combined with the psychiatric disability of PTSD, or that the primary injury contributed to a greater overall disability based on pre-existing psychiatric disability. No SIF liability is found.

Liability for Unpaid Medical Expenses

Nothing in the record suggests Dr. Hurford’s treatment (and release) of Claimant was inappropriate. Claimant offered no proof whatsoever that Dr. Hurford’s management of his care was negligent or even subpar; his own experts do not even broach the subject. Claimant’s Dr. Wolfgram identified no treatment irregularities and described the treatments and studies as “various” and “numerous” (p. 9).

Authorization & Reasonableness of Bills

Assuming, *arguendo*, that the bills are found to be totally related to the reported injury of 2008, the treatment underlying the bills is undisputably unauthorized. Section 287.140.1, RSMo, (2000), provides, in relevant part:

“... employer shall provide such medical, surgical, chiropractic and hospital treatment, ... as may be reasonably be required after the injury or disability to cure and relieve from the effects of the injury.” (Emphasis added.)

From this language the courts have determined an employer is held liable for medical treatment procured by the employee only when the Employer has *notice* that the employee needs treatment or a demand is made on the Employer to furnish medical treatment and the Employer refuses or fails to provide the needed treatment. Blackwell v. Puritan-Bennett Corp., 901 S.W.2d 81 (Mo.App. 1995)(citing Hawkins v. Emerson Electric Co., 676 S.W.2d 872, 880 (Mo.App. 1984). However, there is no clear authority for what level of detail or renewal of demand for treatment is the responsibility of a claimant.

Employer tendered providers many of whom found few positive findings in their examinations as enunciated elsewhere herein. Dr. Hurford released Claimant at maximum medical improvement (MMI) on February 23, 2009. Claimant neither disputed the quality of care from St. Louis Spine Care Alliance nor gave notice to Employer of expert opinion requiring further treatment. After release at MMI, Claimant did not seek an order of the Division to the contrary under Section 287.140.2 RSMo (Cum. Supp. 2005). Claimant is permitted to treat privately.

As outlined above, Employer is liable only for medical expenses incurred prior to Employer's ratification of Dr. Hurford as treating physician. The amount totals \$4,666.00.

An employer is liable for permanent total disability compensation under Section 287.200 RSMo (1994) if there is evidence in the record that the primary injury alone caused the employee to be permanently and totally disabled. *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 276 (Mo.App. 1996); *Moorehead v. Lismark Distributing Co.*, 884 S.W.2d 416, 419 (Mo.App. 1994); *Roby v. Tarleton Corp.*, 728 S.W.2d 586, 589 (Mo.App. 1987). The Second Injury Fund is only liable for permanent total benefits when a "prior injury combines with a later, on-the-job inquiry so as to produce permanent and total disability that would not have resulted in the absence of the prior disability or condition." *Wuebbing v. West County Drywall*, 898 S.W.2d 615, 616-617 (Mo.App. 1995).

The record at hand demonstrates Claimant had a disc pathology at two levels as early as 1984. Moreover, the affected dermatomes were extremely serious inasmuch as both levels of L4-5 and L5-S1 involve nerve distribution into the legs. The medical record of same is undisputed in the record but is not consistently or convincingly addressed by several of the experts.

Mr. England's testimony, for example, that Claimant had no medical restrictions regarding his back prior to his 1994 injury is incomplete and misleading and not based on Claimant's actual medical condition during the 1980's as evidenced by the undisputed medical record of that same period. Also, it is misleading to characterize Claimant's condition prior to the reported injury as a non-disabling pre-existing condition because of a few years of non-treatment (eg. 1990-1993).

Such analysis finds is place with conditions that were never treated or never disabling such as with the recurrent problem of employees with detection of advanced degenerative changes which are not accompanied by clinical findings or lost time.

Future Medical Expense

Section 287.140 Mo.Rev.Stat. (1994) requires that the employer/insurer provide "such medical, surgical, chiropractic, and hospital treatment...as may reasonably be required...to cure and relieve [the employee] from the effects of the injury." Future medical care can be awarded even though claimant has reached maximum medical improvement. *Mathis v. Contract Freighters, Inc.*, 929 S.W.2d 271, 278 (Mo. App. 1996). Future expense awards may be indefinite but the underlying theory of medical causation may not. While conclusive evidence is not required, evidence which shows only a mere possibility of the need for future treatment will not support an award. *Dean v. St. Luke's Hospital*, 936 S.W.2d 601, 603 (Mo. App. 1997). An employee is not entitled to future medical treatment for a possible disability resulting from some other cause. *Breyer v. Howard Construction*, 736 S.W. 2d 78, 82 (Mo. App. SD 1987).

Here, Dr. Volarich offered only the most general suggestion of palliative measures as future medical treatment requirements. As stated above, he cautiously predicated a surgery decision as depending on a qualified expert's suggestion. Dr. Stillings, found above to be more credible than Dr. Wolfgram in this case, did not find Claimant in need of future medical treatment. This record cannot support an award of future medical treatment.

Claimant's Credibility

The several treatment provider and a half dozen experts were necessarily required to assess Claimant's condition. As the record reveals, Claimant's complaints and other testimony are not reliable. For example, Claimant told Dr. Volarich that he had ridiculer symptoms in both legs yet ambulated freely into the courtroom with a fluid gate in no apparent distress.

Claimant testified at trial that his right foot injury was symptoms free despite surgery with internal fixation (ORIF): "it feels like there was no surgery." Dr. Volarich found it symptom free and assigned no PPD. In contrast, he told his forensic (non-treating) expert, Dr. Wolfgram, that his right foot is painful occasionally and reminded Dr. Wolfgram that it contains a screw.

Claimant insisted he can longer tolerate crowds or conventional social gatherings and and that he sits around the house. Yet, he was very interested in his trial and testified passionately in long narratives.

This sort of inconsistency parallels the impressions of the treating physician, Dr. Hurford and Employer's forensic psychiatrist, Dr. Stillings.

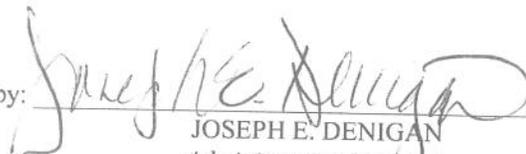
Conclusion

Accordingly, on the basis of the competent and substantial evidence contained within the whole record, Claimant is found to have sustained a fifteen percent PPD of the body referable to the low back, seven and one-half percent PPD of the left shoulder, and two percent PPD of the body referable to aggravated personality disorder. In addition, Claimant is entitled to \$4,666.00 for medical expenses incurred.

I certify that on 5/3/12 I mailed a copy of the foregoing award to the following entities at their address of record: 1) parties by certified mail, and 2) counsel for the parties by first-class mail.

Date: _____
By: np

Made by:


JOSEPH E. DENIGAN
Administrative Law Judge